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NTSB Order No. EA-3743

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of November, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. ROBERT E. OLSEN, Respondent.	Docket SE-10883

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge John E. Faulk, issued on July 11, 1990, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, finding that respondent had violated 14 C.F.R. 91.29(a) and 91.9,[2] and suspending respondent's private

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]§ 91.29(a) provided: "No person may operate a civil

pilot certificate for 60 days.[3] We deny the appeal.

On April 16, 1989, respondent, piloting a Cessna (push-pull) 337 with three passengers, was forced to abort a takeoff due to the failure of the aft engine. The landing damaged the aircraft's propeller and sheared off the nose wheel. FAA personnel testified that, when they investigated the incident, they discovered numerous discrepancies in the aircraft, a number of which were photographed (see Exhibits C-1 through C-8).[4] Allegedly, all but one of the discrepancies existed prior to (i.e., were not caused by) the aborted takeoff. The record further established that respondent's repair station had completed 100-hour and annual inspections on the aircraft 3 days before the incident, and respondent had personally certified the aircraft as airworthy. The Cessna had been flown for only .2 hours between the certification and the incident.

Although respondent admitted removing the ADF and VOR/ILS equipment, and admitted that certain missing rivets were

(..continued)
aircraft unless it is in an airworthy condition."

§ 91.9 provided: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]The Administrator had sought a 90-day suspension. He did not appeal the reduced sanction.

[4]The complaint listed 18 discrepancies, including a fuel leak, missing seat track stops on both the pilot's and co-pilot's seats, a missing rear engine cowl flap actuator motor, a missing ADF receiver, ADF indicator and VOR/ILS instrument, a cracked muffler, frayed and worn brake and fuel hoses, and corroded or rusty areas.

overlooked during the inspection, he urged that many other of the cited defects were caused by the aborted takeoff. As to those that were not, respondent argued that were not required for, or visible during, a preflight check, and did not jeopardize safety. Respondent pointed out that the aircraft's owner had worked on the plane after the inspection and before the flight. Respondent did not know exactly what had been done, but testified that the engine cowls were opened and the interior disassembled.

This case presents two central issues: as a matter of fact, what discrepancies existed before the accident (defects occurring because of the accident or later not being chargeable under the complaint, as framed); and, as a matter of law, to what standard is respondent held. The law judge concluded that, of the 18 claimed discrepancies, six were not proven by the Administrator either to be true or to have existed prior to the incident.[5] Although not all were discussed, all other items in the complaint were found to have been proven by a preponderance of the evidence, and the law judge concluded that a violation of § 91.29(a) had been established.

In reaching this result, the law judge rejected respondent's claim that his obligation in ensuring an airworthy aircraft was limited to completing the preflight check set forth in the aircraft's manual and to acting based on knowledge any pilot

[5]These six related to two fuel leaks (Complaint ¶¶ 5a and 5p), missing screws from a fuel access panel (¶ 5c), the cracked muffler (¶ 5g), flexible fuel hoses (¶ 5m), and a landing gear brake hose (¶ 5q).

would have. Instead, the law judge concluded that respondent's unique position (e.g., having certified the aircraft as airworthy shortly before the incident) must be taken into account.[6] Finally, the law judge found an independent (as opposed to residual, see Administrator v. Pritchett, NTSB Order EA-3271 (1991)) violation of § 91.9, "because respondent had the superior knowledge nonetheless, he operated the aircraft with passengers on board and I consider that to be a careless operation." Tr. at 156.

On appeal, respondent continues to challenge the attribution to him, in his pilot role, of other knowledge he might have had as the one who certified the aircraft to be airworthy. He avers that the matters before the Board here are matters that are only properly brought against his mechanic's certificate. He sees the law judge's analysis as imposition of a strict liability standard.

For each of the violations found by the law judge, respondent also discusses why he believes he should not, in any case, be held to knowledge of or responsibility for the unairworthy condition. Respondent's answers fall in four categories: a reasonably prudent pilot would not check the item during his preflight check; the condition was caused by the incident or the FAA did not prove the condition existed; the owner is responsible, in light of his post-inspection work on the

[6]The law judge stated: "he is charged . . . with the superior knowledge that he had at the time." Tr. at 152.

aircraft; and the discrepancy is de minimis and/or raised no true safety issue. Respondent also challenges the law judge's reasoning behind his § 91.9 finding, and suggests that, even if the law judge's findings are affirmed, the sanction is too severe. A 15-day suspension is suggested as more in accord with precedent.

We disagree with each of respondent's propositions. Most importantly, in finding that respondent's actual role must be taken into account, the law judge was applying analogous, long-held Board precedent. See, e.g., Administrator v. Doppes, 5 NTSB 53 (1985) (respondent's background, including his maintenance experience, indicate that he was aware, or should have been aware, of the aircraft's unairworthiness); Administrator v. Parker, 3 NTSB 2997 (1980) (standard applied to pilot is whether he knew or should have known of airworthiness problem); and Administrator v. Dailey, 3 NTSB 1319, 1321 (1978) (pilot responsible to determine airworthiness; pilot had reason to believe aircraft was not airworthy).[7]

We are not imposing a standard of strict liability when we hold that respondent's behavior is to be measured against what he personally knew or should have known about the aircraft, both as its pilot and as a mechanic who had recently been involved in its maintenance. Such a standard merely expects respondent to react

[7]We do not think the Administrator's cite to Administrator v. Golden Eagle Aviation, Inc., 1 NTSB 1028, 1032 (1971) is especially relevant. Use of the word "operator" there refers to the respondent corporation, not a pilot respondent.

reasonably and prudently to information of which he is or should have been aware (from whatever source). Accordingly, we not only reject respondent's overall theory of responsibility, we also reject his notion that he should not be held responsible in instances when a reasonably prudent pilot would not have located the defect during a preflight check.

We also see no basis to reverse the law judge's findings of fact regarding the state of the aircraft immediately prior to the incident and the quality and extent of the FAA's proof. To do so, we would have to find the law judge's credibility findings to be arbitrary or capricious -- a result the record does not support. And, contrary to respondent's claim, there is supporting evidence in the record detailing each alleged deficiency. See, especially, Exhibit C-11.[8] While we agree with respondent that, to be airworthy, an aircraft need not be in perfect condition, the extent of the defects here leaves no doubt that this aircraft was not airworthy.[9]

Furthermore, we decline to excuse respondent by accepting his argument that the aircraft's owner is responsible due to his

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[8]Respondent's analysis (see, e.g., Appeal at 10) suggests that the Administrator is subject to a standard of proof far beyond that actually applicable. The Administrator is obligated to prove his allegations by a preponderance of the evidence. He has done so here, as to those matters affirmed by the law judge, by presenting credible testimony from the involved FAA inspectors and supporting documentation.

[9]We note the long-standing distinction between airworthiness and "flyability." An aircraft may be flyable but not be airworthy.

unidentified work on the plane.[10] As the operator of the aircraft and the pilot-in-command, respondent was required to take all reasonable and prudent actions to ensure its airworthiness. Thus, even were we to assume that the owner's actions led to some of the defects (a fact not established in the record), respondent failed to act as a reasonable and prudent pilot. In the circumstances (having seen the owner remove the interior of the aircraft and the engine cowls), respondent should have checked with the owner to determine what exactly had been done to the aircraft.

That a discrepancy may be, in respondent's eyes, a de minimis deviation from the aircraft's type certificate is also no basis for this Board to dismiss the Administrator's § 91.29(a) order. We do not sit to second-guess the Administrator's policy decisions. Administrator v. Ewing, 1 NTSB 1192, 1194 (1971) ("it is well settled that the Board does not have authority to pass on the reasonableness or validity of FAA regulations, but rather is limited to reviewing the Administrator's findings of fact and actions thereunder").

Finally, respondent challenges the law judge's finding of a separate (as opposed to derivative) § 91.9 violation. We need not consider the law judge's reasoning on this matter (and thus, will not adopt or reject it), as it has no effect on the ultimate

[10]Similarly, with no evidence to support such a conclusion, we will not find that the discrepancies somehow occurred within the 3 intervening days. See, e.g., Administrator v. Peralta, 1 NTSB 1724, 1726 (1972).

conclusion. Whether the § 91.9 violation is separately proven or is based on the § 91.29(a) finding,[11] a § 91.9 violation has been established. Respondent knew or should have known he was piloting an unsafe aircraft.[12] The sanction, moreover, is not inconsistent with precedent. We have reviewed the cases cited by the parties, and Administrator v. D'Attilio, NTSB Order EA-3237 (1990), and find the 60-day suspension imposed by the law judge to be within the scope of sanctions available for varying degrees of airworthiness violations.[13] Respondent has offered nothing to support his proposed 15-day suspension, and we see no mitigating factors that would warrant a further reduction from the law judge's order.

[11]See Pritchett, supra (a violation of an operational regulation is sufficient to support a finding of a "residual" or "derivative" § 91.9 violation).

[12]The violations described in the complaint's ¶¶ 5b and 5j, standing alone, raise considerable safety concerns.

[13]In D'Attilio, we upheld emergency revocation and stated that it was a more serious breach of the airman's duty not to operate an unairworthy aircraft when he is trained as a mechanic and knows of the defect.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The 60-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.[14]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[14]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).